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BACK TO CONTRACT?¹

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The idea of contract no longer has the prestige that it once did. No one would write today, as Maine did, that "the society of our day is mainly distinguished from that of preceding generations by the largeness of the sphere which is occupied in it by Contract."² The concept of two private individuals bargaining and forming an agreement that will govern their relationship is foreign to the world of the Collective Bargaining Agreement, government or other form contracts, acreage limitations, the Securities and Exchange Commission, Telstar and all the rest of it. Despite this, in areas in which individuals do still deal with each other on an individual basis, there is a very strong tendency to have the relationship governed by contract, by the agreement the parties have made, and not by any externally imposed norms. This is notably the case with marriage, which most courts today in fact regard as a contractual relationship, which can be terminated when the parties wish, and in accordance with the terms that they have agreed on, although the legal theory is, of course, quite different. The extraordinary thing is that the one area of the law which one would expect to be entirely contractual—the sale of goods—appears to be nothing of the sort. Such concepts as "warranties" of quality, "title," and "passage of property" are all too clearly derived from the law of property, not contract.

They are, moreover, embodied in a special statute, so that a contract of sale (for there are such) is not governed by the law of contracts, but, at least until recently, by the Uniform Sales Act (where it is in force), or so it would appear. This despite the fact that American contract law in its

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1. See Llewellyn, *Through Title to Contract and a Bit Beyond*, 15 N.Y.U.L.Q. REV. 159 (1938). My indebtedness to Professor Llewellyn is, fairly obviously, for much more than the title (which is not to say that he would have agreed with this article).

2. MAINE, *ANCIENT LAW* 179 (Everyman ed. 1917).

current state purports to be general in its application, and would seem to offer enforcement to almost any promises buyer and seller might make.³ Since, moreover, there is no strong public policy that requires regulation of sales contracts, and since, in any event, there is no such policy expressed in the statutes, it would not be surprising to see the courts be sympathetic to any efforts of buyer and seller to arrange their own affairs, to contract. And, indeed, it is my belief that if, when one looks at the sales cases, one ignores the law of sales, and instead asks the question, how would this case be decided if there were no law of sales, but only contract, it is usually much easier to follow the court than if one looks at the "law of sales" as the court purports to do. Nor has the situation changed as much as one might suppose under the Uniform Commercial Code.

In other words, I would suggest that the dominant system of ideas that underlies sales law has always been contractual—the important thing has always been the agreement. Admittedly this cannot be "proved." For one thing, one can scarcely ever prove that a court "really" decided a case on a different basis than the expressed one. Moreover the data (the cases) are too numerous for the detailed factual analysis that would be necessary. It seems to me, however, to be an analysis which fits the generally accepted rules rather better than any other I know of, and it might be a very good thing if this fact (as I take it to be) were overtly recognized. Not, to be sure, that such a recognition would in general cause different results in the decision of cases, but it would, I believe, make them easier to decide and argue. Moreover, when the Uniform Commercial Code is regarded in this light, significantly different methods of application and interpretation suggest themselves.

I. THE HISTORICAL BACKGROUND OF SALES LAW

This tendency is, I believe, anything but new. It seems to me that these contractual ideas dominate in sales law from its very beginning. Indeed, it seems likely that it was at the time of the beginning of the law that the reasons for the present confusion developed. The origins of sales law are, after all, relatively recent. For all practical purposes, sales law in England and the United States began to develop towards the end of the eighteenth century. Prior to that time, the common law courts did not get any significant number of sales cases, any more than they get other types of commercial cases, these being taken care of (presumably) in other forums—the courts of

3. RESTATEMENT, CONTRACTS § 1 (1932). Not, to be sure, that the Restatement declares expressly that it applies to all promises, but that is, it seems to me, the reasonable interpretation of it.

the law merchant.⁴ In the course of the eighteenth century this changed, and a number of these cases did appear. When they did, there were perhaps three possibilities as to what could have happened. The mercantile law of sales could simply have been adopted by the common law courts, as was done in the case of negotiable instruments,⁵ and, to a certain extent, insurance.⁶ Or, an entirely new body of law could have been developed. Or, an effort could have been made to assimilate the sales cases to some other branch of the law which was administered by the common law courts.

The third alternative is, I would suggest, the one that was chosen (not that there was any conscious choice). This is what one would expect. The first was impossible because there seems to have been no articulated mer-

4. It is, of course, generally known that the common law courts did not receive any significant amount of mercantile business until the middle of the 18th century. See FIFOOT, LORD MANSFIELD 13-14 (1936); Scrutton, *General Survey of the History of the Law Merchant*, in 3 SELECT ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY 7 (1909). There are not, however, as many sales cases during Mansfield's time as one might suppose. I found only 7 in the approximately 740 cases of Burrow's Reports, and the facts were not completely clear in all these. There were more, but not many (14), that involved negotiable instruments. The figures may not be precise because of difficulty of determining the subject matter of the cases at times, but the proportions are almost certainly correct. Indeed, there is considerable doubt as to how much significant mercantile business came to the common law courts after Mansfield. See note 7 *infra*. In this connection, Kent's opinion in *Seixas v. Woods*, 2 Cai. R. 48 (N.Y. 1804), is interesting. After stating that the doctrine of *caveat emptor* was announced in *Chandelor v. Lopus*, Cro. Jac. 4, 79 Eng. Rep. 3 (Ex. 1603) (see note 23 *infra*), and reaffirmed two centuries later in *Parkinson v. Lee*, 2 East 314, 102 Eng. Rep. 389 (K.B. 1802), he wrote (2 Cai. R. 55), "the intermediate cases are to the same effect." Following this there are eight citations: Co. Litt*102a which contains a statement about *caveat emptor* embedded in a discussion of real property warranties and which refers to a discussion of *Chandelor v. Lopus*, *supra*; Cro. Jac. 197, 79 Eng. Rep. 172 (Ex. 1608), presumably *Roswel v. Vaughan*, an action of deceit against the seller of a vicarage; 1 Sid. 146, 82 Eng. Rep. 1022 (K.B. 1664), presumably *Leakins v. Clissel*, an action of deceit for misrepresentation of the rent of some houses; Yelv. 21, 80 Eng. Rep. 15 (K.B. 1603), presumably *Harvey v. Young*, involving the sale of a term and misrepresentations as to its worth; 2 Ld. Raym. 1121, 92 Eng. Rep. 242 (K.B. 1705), another action for misrepresentations as to rent; *Stuart v. Wilkins*, 1 Doug. 18, 99 Eng. Rep. 15 (K.B. 1778), involving sale of a horse (one of Mansfield's few sales cases); *Sprigwell v. Allen*, Aleyn 91, 82 Eng. Rep. 931 (K.B. 1649), an action for fraudulently selling horse as his when it actually belonged to another; 2 East 498 *notis*, 102 Eng. Rep. 459 (K.B. 1802), presumably *Company of Proprietors of the Mersey and Irwell Nav. v. Douglas*, which apparently involves an action for damming up a navigable stream (the only notes on the cited page refer to a question of venue). Apart from what this may show as to the Chancellor's use of authorities, it indicates surely the paucity of relevant authorities available to one of the best-informed lawyers in the English-speaking world at the time.

5. See 8 HOLDSWORTH, A HISTORY OF ENGLISH LAW 146-77 (1926); HOLDEN, THE HISTORY OF NEGOTIABLE INSTRUMENTS 30-36 (1955).

6. FIFOOT, LORD MANSFIELD 83-108 (1936); 8 HOLDSWORTH, A HISTORY OF ENGLISH LAW 283-93 (1926); Vance, *The Early History of Insurance Law*, in 3 SELECT ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY 98, 109-16 (1909).

cantile law of sales as there was in some other fields such as negotiable instruments.⁷ Moreover, though there was no common law of sales, the concept of sale was not one that was different or foreign, whereas many of the other branches of the law merchant were very foreign indeed. Gentlemen bought and sold horses; they did not, originally, endorse bills of exchange.⁸ There is perhaps no need to discuss the second alternative. Starting completely fresh is never a very attractive course of action to anyone if there is even the possibility of finding some form to copy, and in the case of the common law it is even contrary to the theory that the law is ever-present and eternal.⁹ The proper, as well as agreeable, course always is to proceed by analogy if no direct precedents are available.¹⁰

Assuming one had decided to try to fit sales into some existing pattern, the next problem was, of course, to choose the pattern (again no one was doing this consciously). Nowadays we should probably choose contract since a

7. It is perfectly clear that there were large numbers of "sales" cases in the mercantile courts such as Admiralty and probably the Council, etc. See, e.g., for Admiralty, *Poyntell v. DeBillota*, 2 SELECT PLEAS IN THE COURT OF ADMIRALTY 94 (Selden Society, Marsden ed. 1897) (oranges and a ship); for the Council, see Dawson, *The Privy Council and Private Law in the Tudor Stuart Periods*, 48 MICH. L. REV. 393, 406-09 (1950). (Obviously some of the cases involve sales, notably long accounts, *id.* at 409 n.57). Doubtless there was a sort of law developed to deal with them, although it quite possibly did not develop in the courts, but among the arbitrators to whom the cases were commonly referred, according to Professor Dawson. There is not, however, the type of statement of this law, if it existed, that one finds for negotiable instruments and certain other types of mercantile law in such a work as MALYNES, *LEX MERCATORIA* (1656), or the earlier Italian books. See LOPEZ & RAYMOND, *MEDIEVAL TRADE IN THE MEDITERRANEAN WORLD* 266-89 and *passim* (1955). Hence, the only materials one has are the records of the various courts. These are not very helpful now, but must have been of no use prior to the Selden Society's endeavors. See, for a description of the difficulties in using the admiralty records, 1 SELECT CASES FROM THE COURT OF ADMIRALTY ix-lxv (Selden Society, Marsden ed. 1894). There are other materials too, notably those of the East India Company which had a quite formalized claims procedure. See, for some examples from the 17th century, A CALENDAR OF THE COURT MINUTES OF THE EAST INDIA COMPANY 1671-1673, at 80 (Sainsbury ed. 1907-1938 (cases of complaints by Messrs. Bathurst and Wooley); *id.* (1660-1663) at 279 ("allowance on tincal is made to Mr. Vandermarsh and to Mr. Hampson on piece goods and indigo"). There are many similar references throughout the reports. The records for the 18th century are not printed but for some references, see APP. TO SUTHERLAND, A LONDON MERCHANT 129-32 (1933), in which there are excerpts from the minutes of the Company regarding fraudulent sales of cloth to the Company. There is a lot more material of a similar type, but obviously it is not so formulated as to have been of much help to a court which was moving into a new area.

8. Bills of exchange could only be enforced at first by merchants. SEE HOLDEN, *THE HISTORY OF NEGOTIABLE INSTRUMENTS* 32-34 (1955). Of course gentlemen had in fact learned to ruin themselves by borrowing without negotiable instruments. A recognition would do. See *Westby's Case*, 3 Co. *67a, 76 Eng. Rep. 783 (Q.B. 1592).

9. See GOEBEL, *CASES ON THE DEVELOPMENT OF LEGAL INSTITUTIONS* 175-76 (1946).

10. CROSS, *PRECEDENT IN ENGLISH LAW* 4-5, 19-30 (1961).

sale is a mass of promises. For example, Seller promises that he will deliver certain specified goods packed in a certain way at a certain date (or within a certain period) to a named carrier and receives a certain type of bill of lading which he will send through banking channels along with a certificate for insurance that he has taken out. Buyer promises that, assuming that these steps are followed, he will cause to be issued to Seller a letter of credit which will have certain promises by a certain bank etc. One could complicate it further. But this is recognizably contract. Unfortunately there was no law of contract at the time. To be sure, rules of law were developing which would enable a party to accomplish almost everything that can be accomplished with contract law today, but they were not really organized under general theories of contract liability. Rather they were organized under remedies, under the various forms of action, especially *assumpsit*, so that people did not think of "contract" when they saw promises, but rather asked the question whether a particular promise was similar to one in which a certain action was allowed.¹¹ Also, unfortunately, there is another aspect to a sale beside the exchange of promises, and this is the transfer of the title to the goods from the Seller to the Buyer. If the sale is a face-to-face, immediately-delivery-for-cash transaction, this may, in fact, be the most obvious element. And the transfer of property in chattels can be easily analogized to a very highly developed—one might almost say over-developed—branch of the eighteenth century common law: that of the conveyance of interests in real property. Moreover, though there was no well organized common law of the promissory aspects of sale, there was a good deal of law regarding title to chattels.¹² Hence it was likely that sales would be thought of in terms of property, not contract.

Once the decision was made to think of the property aspects of the transfer, instead of the promissory, then inevitably the ideas of real property would govern, since that was the dominant type of property. This is unfortunate because the factual situation which serves as a model for the rules of con-

11. See, *e.g.*, for a discussion of the different procedural elements of consideration, PLUCKNETT, *A CONCISE HISTORY OF THE COMMON LAW* 650-51 (5th ed. 1956); FIFOOT, LORD MANSFIELD 118-21 (1936). As is well known, Blackstone has less than a full chapter on contracts (ch. 30, vol. II which contains 30 pages). This chapter includes also, gifts, negotiable instruments and some material on insurance and usury.

12. Anciently (in pre-Conquest times), there had been a rather elaborate set of rules on providing one's title to a chattel if challenged, and there were developments from this after the Conquest. 2 POLLOCK AND MAITLAND, *THE HISTORY OF ENGLISH LAW* 155-81 (1895). This ancient procedure was lost, of course, along with all the rest, as the common law developed, but there were successors. This to consider only the actions of the 17th and 18th centuries, *replevin*, *trover* and *trespass d.b.a.*, for some, all could involve a title issue, as could, of course, criminal actions—such as larceny by trick and embezzlement.

veyance of real property is greatly different from many (though admittedly not all) sales of goods and hence the rules are largely irrelevant. A sale of real estate was, and still is to a considerable degree, a deliberate matter. It would normally involve several days at least, and frequently much more time than that. There was no need to rush. It was an isolated transaction. One sale, one tract of land. The legal aspects of the transaction occupied almost as much of the parties' attention as the economic. Lawyers or people who act as lawyers were usually involved, or, at the very least, a legal form was employed. No one would be satisfied in a sale of land until he got a deed, preferably a roll of them. The subject matter of every sale of land was the same—land. There is far more similarity between a lot in London, a tract of forest land, and a few acres of moor, than there is between a diamond, a shipload of fruit on the point of rotting and the next fifteen years wool crop of an abbey (though admittedly the divisions of title—life estates, mortgages, terms for years, etc.—can be quite different). The rules of law either reflected the desires and intent of the parties or the parties were willing to adapt themselves to the rules of law, or, if they were not, to develop legal loopholes such as trusts. And finally, usually the buyer wished to get the land and use it (which does not mean necessarily that he wished to occupy it). He wished to get title and was very conscious that title was being transferred from the seller to him.

The picture with chattels was, or could be, very different. "Chattels" was, in the first place, such a general term as to be meaningless. Even ignoring the extraordinary matter of chattels real, chattels included personal items of all sorts—jewelry, clothing, furniture, food in small consumable quantities, gold, art-works, animals, etc., but also, all these items in wholesale quantities, shiploads of pepper, tea, silk, barges full of coal, wood, wheat, building stone and ships stores, to say nothing of future goods such as manufactured articles as yet unmade and wool to be sheared from sheep as yet unborn. One might suspect that the state of mind of a seller of a warehouse full of tar and rope would be a trifle different from that of someone arranging to dispose of a collection of casts from the antique in order to move into a more fashionable field—chinoiserie perhaps. England (and the United States) had, during the eighteenth century, and had had for centuries, a highly developed and very sophisticated commerce with a great deal of division of labor and specialized production and all manner of complicated mercantile devices.¹³ Credit of some sort—and the sorts were legion—was

13. Any investigation of the activities of merchants would reveal this. For a general view, one of the best sources is perhaps Westerfield, *The Middleman in English Business*, 19 *TRANSACTIONS OF THE CONNECTICUT ACADEMY OF ARTS AND SCIENCES* 111 (1915). The purchase of the wool clip is of course from a much earlier time. So early indeed that

the rule rather than the exception in transactions between merchants. This was the era of the China and India trade after all—the sedentary merchant with his agents around the world, Lloyd's coffee house and all the rest (though there were also of course many non-mercantile transactions).¹⁴

In addition, however, to their varied subject matter, sales of chattels had other characteristics that differentiated many of them from sales of real estate. They were not normally consummated with the help of a lawyer. There was not usually a writing, or at least not a writing of the same type as a deed. Then too, the volume of sales was so much greater. Any merchant would have hundreds, perhaps thousands of transactions in the course of a year. Even the most active land-speculator only a fraction of that total. Perhaps most important, the legal aspects of the transaction did not dominate or even assume a very important role. There were no strict family settlements of wagon loads of wheat or coal, or even of pins or loaves of bread (there were of course for heirlooms). In the sales of chattels, people in general worried about price, delivery, quality and the like, not about title.

The result is that the technical, rigid, complex, and static rules of conveyancing which reflected fairly well the factual context in which land was transferred were applied to the very different field of transfers of chattels, which were rapid, fluid, frequent, and complex, if they were, only in a mercantile (as in the case of dealings in exchange) and not in a legal way. In theory this could have had the result of choking commerce, or of causing it to change itself entirely in order to harmonize with the new law (for it was new to merchants). In fact, what happened, it is believed, is that in the first place it was only the words of real property law that were transferred, not the substance. And as a corollary, under the cover of real property terminology, a quite different body of law was developed. In the second place, for the most part merchants continued to ignore the courts.¹⁵ As they do still.

it shows how completely false are any ideas that complicated credit ideas or selling patterns are modern, and that medieval trade was entirely a matter of quaint peddlers with dusty feet running around to fairs. For a description of the trade, see Whitwell, *English Monasteries and the Wool Trade in the 13th Century*, 2 *VIERTELJAHRESSCHRIFT FUER SOZIAL UND WIRTSCHAFTSGESCHICHTE* 1 (1904); POWER, *THE WOOL TRADE IN ENGLISH MEDIEVAL HISTORY* 15-62 and *passim* (1949).

14. See GRAS, *BUSINESS AND CAPITALISM* 120-74 (1939). See, as an instance of the nature of the trade, an account of an American merchant and his English correspondent in Donnan, *Eighteenth Century English Merchants, Micajah Perry*, 4 *JOURNAL OF ECONOMIC AND BUSINESS HISTORY* 70 (1932).

15. See Jones, *An Inquiry into the History of the Adjudication of Mercantile Disputes in Great Britain and the United States*, 25 *U. CHI. L. REV.* 445 (1958). It seems safe to say that generally professional merchants do not make use of courts or even arbitration as a normal method of dispute settlement. See notes 99, 100 *infra*.

II. WARRANTIES

The superficial prevalence of property concepts is obvious enough to anyone who reads the Sales Act which is, in effect, a restatement of the traditional view of the field. The great importance of title is perhaps the most well-known instance.¹⁶ But it is evident in the most—indeed, at the present time, the only—litigated field of sales, the seller's obligation as to quality, or warranty. The extent of the confusion engendered by the use of property concepts in this area is immediately apparent from the fact that, prior to the Uniform Commercial Code, the official doctrine was that there was no general obligation of quality except in certain specified situations.¹⁷ This was based on the supposedly ancient rule that there was no quality obligation at all, *caveat emptor*.¹⁸ To be sure the exceptions have generally almost eaten up the rule, but this negative formulation can still cause trouble,¹⁹ and in earlier days it caused a good deal.²⁰ On its face, the rule is ridiculous and impossible to apply, for if it were true, what would the seller have promised to do? While it is doubtless possible to have a sale or contract of sale for "that pile of something over there in the corner under the old rags if it is anything," it is not usual.²¹ Even in the horse cases (pace Prof. Llewellyn),²² the strictest, most uncommercial court would presumably think the buyer had some recourse if the thing that was furnished him under a contract for the sale of a "horse" was in fact a cow or a saw horse. And query, even, if a dead horse would suffice. Normally, of course, there is a much greater obligation than that. The rule *caveat emptor* was sup-

16. It would perhaps be more accurate to say that the Sales Act was a restatement of one view of sales law. See note 40 *infra*. As to title, see Llewellyn, *Through Title to Contract and a Bit Beyond*, 15 N.Y.U.L.Q. REV. 159 (1938).

17. "Subject to the provisions of this act and of any statute in that behalf, there is no implied warranty or condition as to the quality or fitness for any particular purpose of goods supplied under a contract to sell or a sale, except as follows. . . ." UNIFORM SALES ACT § 15.

18. See 1 WILLISTON, SALES § 195 (rev. ed. 1948) (especially n.6).

19. See, e.g., *Torpey v. Red Owl Stores*, 228 Fed.2d 117 (8th Cir. 1955), holding that a retail sale by grocer of jar of applesauce was not a sale by description, hence there was no warranty of merchantability, and no reliance on skill and judgment of seller so no warranty of fitness.

20. See *Seixas v. Woods*, 2 Cai. R. 47 (N.Y. 1804).

21. Of course, in the case of the present sale as opposed to the contract for sale, it makes more sense, or can. While there may, in that case, be words—"I'll sell you that horse"—the transaction probably does not depend much on them.

22. See Llewellyn, *Across Sales on Horseback*, 52 HARV. L. REV. 725 (1939); Llewellyn, *The First Struggle to Unhorse Sales*, 52 HARV. L. REV. 873 (1939). It was realized earlier that the horse cases were special. See STORY, SALES § 362 (3d ed. Perkins 1862); 2 BLACKSTONE, COMMENTARIES *451 n.9 (15th ed. Christian 1809), but the proper conclusions were not drawn.

posed to be an ancient one, but it has been quite conclusively shown by Prof. Hamilton that it was nothing of the sort.²³ It first came to prominence apparently, in *Chandelor v. Lopus*²⁴—an essentially unimportant early seventeenth century case involving the sale of a medical stone by an apothecary—which more or less disappeared from view until (probably) some enterprising attorney dug it out in the late seventeenth century when the sales cases began to come in some number to the common law courts.

In its received form the rule was interpreted to mean that there was no obligation as to quality of the goods unless the words “warrant” were used. The “warranty” was regarded as being a separate transaction from the

23. Hamilton, *The Ancient Doctrine of Caveat Emptor*, 40 YALE L.J. 113 (1931). Prof. Hamilton pointed out that the maxim was completely contrary to medieval ideas and practices which set rigid standards of quality for merchants and manufacturers. They were enforced as well as they could be, especially by town guilds, but also by the central government, in its efforts, for instance, to insure the quality of English wool shipped abroad. As for the maxim itself, it was not, in form nor content, Roman, nor a part of the medieval law merchant. It appears for the first time in the 16th century, in connection with horse trading and in a few other contexts. Coke uses it twice, one in reference to horse-fairs, 2 COKE, INSTITUTES *714 and in connection with the warranty of land. Co. Litt. *102a. In the latter case, the maxim is set out in one of its traditional forms: “note that by the civil law everyman is bound to warrant the thing he selleth or conveyeth, albeit there is no express warranty either in deed or law; but the common law bindeth him not, for *caveat emptor*.” Another form of the rule was an artful misquotation from the Statute of Westminster II, ch. 40 (1295): “*caveat emptor qui ignorat non debuit quod alienum jus emit*.” This appeared for the first time, according to Prof. Hamilton, in *Moore v. Hussey*, Hobart 93, 80 Eng. Rep. 243 (K.B. 1601), a case involving the ravishment of a ward [40 YALE L.J. 1133, 1165-66 (1931)]. The maxim, to the extent it had any validity, did not, in other words, have anything to do with sales of goods until *Chandelor v. Lopus*, Cro. Jac. 4, 79 Eng. Rep. 3 (Ex. 1603). Thereafter, citations were to *Chandelor v. Lopus* and Coke as embodying the wisdom, or anyway the spirit, of the middle ages, and hence furnishing the basis of the modern law, when in fact they did nothing of the sort.

24. Cro. Jac. 4, 79 Eng. Rep. 3 (Ex 1693). The case arose out of the sale by a goldsmith of a purported bezoar stone (supposedly of therapeutic value) which was not in fact a bezoar stone. The buyer sued in case for deceit, won in King’s Bench, but lost in the Exchequer Chamber on the ground that there must be a warranty or false statement as to the nature of the article made with knowledge of its untruth. The purchaser brought a new action alleging false statements knowingly made by the Seller. See NOTE, 8 HARV. L. REV. 282 (1894). The Seller argued that an express warranty was necessary and argued *caveat emptor*. It is not clear who won: probably the buyer. As Prof. Hamilton points out [40 YALE L.J. 1133, 1167 (1931)] the authorities cited in the case are mostly irrelevant to commercial sales. Moreover, the case, as was typical at the time, was unreported for years after its decision and largely uncited probably because there were no sales cases in the courts (except for warranty of title cases at the turn of the century) until late in the 18th century. 1 WILLISTON, SALES § 196 (rev. ed. 1948). Its significance is, of course, as Prof. Williston points out, not in the case itself, but in the use future courts made of it. 1 WILLISTON, SALES § 195 n.6 (rev. ed. 1948).

"sale."²⁵ The connection with real estate law is clear, and the confusion that results from the taking over of rules from other areas only superficially similar, or similar only in certain ways, is also clear.²⁶ In the case of real estate this rule may reflect fairly accurately the reasonable understanding of the parties, or, if it does not, they usually know enough to adjust things to suit their intention. There, this rule means that the basic obligation of the seller is to convey his interest in the property mentioned in the deed. It is assumed that if the parties say no more than that—A hereby gives, conveys, etc. to B and his heirs, assigns, etc. all his right, title and interest in Blackacre, described as follows—then all that B gets is what A had, but he does get that, and everything that the term Blackacre includes such as easements, riparian rights, covenants etc.²⁷ This is all the basic form contract (called a deed) contains.²⁸ If he wants an obligation on A's part that this interest is the only interest in Blackacre, and that he will not be bothered by other claimants, then he must get a special, *additional* agreement from A called a

25. It is still in English law. So, the Sale of Goods Act provides, § 62(1): "Warranty . . . means an agreement with reference to goods which are the subject of a contract of sale, but collateral to the main purpose of such contract. . . ." For a discussion of this, see 1 WILLISTON, SALES §§ 179-84 (rev. ed. 1948). Prof. Williston seemed very dubious about the English distinction between "conditions" and "warranties" §§ 179-80 and about the doctrine that "warranties" are "collateral," §§ 182-83 (this is of course realty doctrine). But he was nowhere nearly critical enough it seems to me.

26. It was said to come from conveyancing by the author of the Sale of Goods Act. CHALMERS, SALE OF GOODS ACT, 246 (1893) (13th ed. Sieghart & Prince 1957). And this would in any event be clear as one can see from a glance at Coke. "A Warrantie is a covenant reall annexed to lands or tenements whereby a man and his heirs are bound to warrant the same and either upon voucher, or by judgment in a writ of *warrentium cartae* to yield other lands and tenements (which in old books is called *ex cambio*) to the value of those that shall be evicted by a former title, or else may be used by way of *rebutter*." 1 COKE, INSTITUTES *365a. See also 2 BLACKSTONE, COMMENTARIES *300-03 where the real estate warranty is explained.

27. 3 AMERICAN LAW OF PROPERTY § 12.87 (Casner ed. 1952). Of course in the case of the contract of sale there is an implied obligation to furnish good title—a warranty. 3 AMERICAN LAW OF PROPERTY § 11.47 (Casner ed. 1952).

28. Deeds are not usually called contracts of course, but what else are they? They do not, it is true, normally contain any promises by the grantee, although they may, in the form of restrictive covenants for example. But they usually contain explicit promises—covenants—by the grantor. This is to say nothing of the conveyance of the interest itself which has promissory elements and may give rise, even without covenants, (although it probably will not) to an estoppel by deed. See *Van Rensselaer v. Kearney*, 52 U.S. (11 How.) 297, 325 (1850). Interestingly enough the original feudal conveyance, the feoffment, was completely contractual, being a collection of reciprocal promises by feoffor and feoffee, and it was this which gave rise to the doctrine of warranty, since if the feoffee was disseised by a third party the feoffor had not fulfilled his obligation, and hence could not expect to get the desired services from the feoffee. See Thorne, *English Feudalism and Estates in Land*, 1959 CAMB. L.J. 193, 196-200.

"warranty"²⁹ (which is the same thing as guaranty).³⁰ And if he wants some further obligation—as that the house situated on Blackacre was livable—there will have to be a further special additional promise which would be unusual.³¹ Absent these additional promises, it is assumed that the parties intended only to sell A's interest. This narrow agreement includes a quality obligation—that A is selling whatever interest he has in Blackacre. He could not defend a later action of ejectment or trespass for occupying Blackacre by asserting that he had offered the buyer Greenacre. But this obligation is a very simple and explicit one, and one as to which relatively few mistakes are likely to be made. And whatever the parties might do if they were unblest with legal advice, they usually have legal advice of some sort (it need not have come from lawyers), and hence can be held responsible for just how the law interprets this transaction. So that the legal interpretation of this transaction is in fact a good rough summary of the parties' probable intentions. But the court does not look at their intentions. It looks at the words they used. If "warrant," there is an obligation. If not, not.³² This is the conveyancing approach ("and his heirs" means a fee simple—nothing else does; it means nothing else).³³

With chattels this is not true. In the first place, the parties do not normally have lawyers and they do not use an instrument as formalized and clear in meaning (legally) as the deed, if, indeed, they use any instrument. The description they use will not be clear at all. Thus A advertised as "braziletto," wood which he had received from X abroad, and showed the invoice so describing it to B, and when B bought it, made out the bill of sale as braziletto.³⁴ The possibilities for interpreting this are manifold if the

29. Cf. 3 AMERICAN LAW OF PROPERTY § 12.50 (Casner ed. 1952). Of course, as the author points out, most deeds contain "warranties." But there can be, and is, considerable variation as to what these are, which indicates their special or collateral nature. See RAWLE, COVENANTS FOR TITLE §§ 16-32 (5th ed. 1881).

30. 12 OXFORD ENGLISH DICTIONARY 114 (1933).

31. *Combaw v. Kansas City Ground Inv. Co.*, 358 Mo. 934, 218 S.W.2d 539 (1949). And see, Dunham, *Vendor's Obligation as to Fitness of Land for a Particular Purpose*, 37 MINN. L. REV. 108 (1953).

32. This analysis may seem a little strained since normally there are explicit warranties, frequently imposed by statute, and the principal problem is to interpret them. Nonetheless, they are special agreements and one must know what warranties have been given before one knows what the grantor's liability is. Moreover, unless there are warranties—if there is, for instance, a quitclaim deed—there will normally be no estoppel by deed. 4 TIFFANY, REAL PROPERTY § 1231 (3d ed. Jones 1939).

33. Of course, nowadays this form is not necessary to convey the fee simple. RESTATEMENT, PROPERTY §§ 39-42 (1940) (Supp. 1948), but the point is made solely to indicate the effect of a rule of law. The Rule in Shelley's Case or the Rule Against Perpetuities might be better examples.

34. *Seixas v. Woods*, 2 Cai. R. 48 (N.Y. 1804). In fact, A was X's agent, but apparently was liable on the contract personally.

problem is regarded as one of finding the intent of the parties—of contract. It could be a promise to deliver all A's interest in the wood, a guaranty that no one else has an interest and a promise that the wood is brazilletto. Or it could be a promise to sell an interest in the wood, and that it was named brazilletto wood in the invoice received from X and that it was bought from X (A was in fact his agent). Or the promise could be limited to an agreement to sell the wood described as brazilletto (whatever it might in fact have been). The phrase "received from X etc." being regarded as an aside. All of these are contracts into which merchants might have entered. The words, in themselves, will bear any of these meanings (and others). If a court were interpreting this as a contract, a number of techniques could be used. One could look for mercantile custom, for example, or one might regard the price as relevant for the purpose of indicating the quality intended. So if brazilletto was selling for between \$5 and \$7 a board foot, the contract price was \$6 and peachum—what was in fact furnished—was selling for \$1.50, then the reasonable inference would be that this was a contract for brazilletto. The solution which seems unlikely is the one the early courts chose—to ignore these problems entirely and concentrate instead exclusively on the problem: was there a special additional agreement, a warranty, that this was brazilletto. In the process they brushed aside any reference to the relevance of the price, not because it had nothing to do with intent, but because it was the civil law, or French, rule as to warranty and hence unsound. Since there were no words of warranty, there was no warranty—no quality obligation—and the buyer loses. There was no enquiry into the nature of the transaction. Rather, a mechanical search for words of art without reference to why they were used or not used.

The approach was obviously ridiculous (though the result in the case was not, on the fact³⁵), and the courts on both sides of the Atlantic sought ways out. The first out was to decide that one need not use the words "warrant." Any words which meant the same things would do—even a mere description of the article was held to be a warranty that that particular article would be

35. Or may not have been. There is a reasonable question, it seems to me, whether a merchant buyer who has seen the goods (as was the case here) should reasonably expect to get the wood—whatever type it may be—that is lying in the warehouse, or expect to get an obligation from the seller, who is admittedly only a broker selling what he has imported, that the wood is of a certain type. Chancellor Kent, one of the deciding judges, became a little dubious later on about the result in the case on the stated ground that the written invoice ought perhaps to have been considered to be an "express warranty." 2 KENT, COMMENTARIES 375 (1827). One might, however, use the same evidence—the invoice—as relevant to show the parties' intent that it was brazilletto which was being sold.

delivered.³⁶ This still meant that the seller would have “two” obligations—the obligation to sell the goods (as in the case of *Blackacre*), and the second, additional, promise—the “express” warranty that the goods were of such and such a quality.³⁷ The next step (actually all of these developments took place at the same time) was to say that in certain cases, such as those in which the buyer asked for the goods for a particular purpose, even if there was no express warranty, there would be an “implied” warranty in addition to the sale.³⁸ There were so many of these exceptional cases that an English court in the period just prior to the codifying of the law wrote:

In some contracts the undertaking of the seller is said to be only that the article shall be merchantable; in others, that it shall be reasonably fit for the purpose to which it is to be applied. In all, it seems to us, it is either assumed or expressly stated, that the fundamental undertaking is, that the *article offered or delivered shall answer the description of it contained in the contract*. That rule comprises all the others; they are adaptations of it to particular kinds of contracts of purchase and sale. You must, therefore, first determine from the words used, or the circumstances, what, in or according to the contract, is the real mercantile or business description of the thing which is the subject-matter of the bargain of purchase or sale, or, in other words, the contract. If that subject-matter be merely the commercial article or commodity, the undertaking is, that the thing offered or delivered shall answer that description, that is to say, shall be that article or commodity, saleable or merchantable. If the subject-matter be an article or commodity to be used for a particular purpose, the thing offered or delivered must answer that description, that is to say, it must be that article or commodity, and reasonably fit for the particular purpose. The governing principle, therefore, is that the thing offered and delivered under a contract of purchase and sale must answer the description of it which is contained in words in the contract, or which would be so contained if the contract were accurately drawn out.³⁹

36. *Seixas v. Woods*, 2 Cai.R. 48 (N.Y. 1804). See also STORY, *op. cit. supra* note 22, § 357n and cases cited; *Parkinson v. Lee*, 2 East 314, 102 Eng. Rep. 389 (K.B. 1802).

37. *McFarland v. Newman*, 9 Watts 55 (Pa. 1839).

38. STORY, *op. cit. supra* note 22, §§ 364-67b, 368, 377. Of course, the difference between holding the vendor liable for breach of *express warranty* when a ship was advertised as “copper fastened,” though sold “with all faults,” when it appeared that the ship was only partially copper-fastened, *Shepherd v. Kain*, 5 B. & Al. 240, 106 Eng. Rep. 1180 (1821) and holding that where silk was sold as “waste silk,” but, though silk (and presumably waste silk), was not such as to pass as “waste silk” in the trade, there was a breach of an *implied warranty of merchantability*, *Gardiner v. Gray*, 4 Camp 144, 171 Eng. Rep. 46 (K.B. 1815), is perhaps not immediately apparent, at least not to me. And so for sales by sample. Compare *Bradford v. Manly*, 13 Mass. 139 (1816) (“a sale by sample is tantamount to an express warranty that the sample is a true representative of its kind”), with the implied warranty that in a sale by sample the bulk will correspond with the sample, STORY, *op. cit. supra* note 22, § 376.

39. *Randall v. Newsome*, 2 Q.B.D. 102, 109 (C.A. 1877). Interestingly enough, Kent

This approach did not prevail, however. Instead, there was a retreat to the conveyancing approach which was embalmed in the Uniform Sales Act.⁴⁰ There, there is a provision for express warranties⁴¹ and a number of implied warranties⁴² (all derived from the case law) for all the world like a statute defining the obligations in a deed.⁴³ (Even the Uniform Commercial Code has not totally abandoned this approach, though it has minimized it.)⁴⁴ But if one looks at what is said in all these provisions taken together, instead of separately, one gets a different idea about what is going on. For, added all together, they provide a pretty good summary of reasonable presumptions as to what parties are likely to have intended in most of the fact situations that arise between buyer and seller.

began his discussion of contracts of sale with many references to Pothier on the nature of the contract of sale. 2 KENT, COMMENTARIES 367-68 (1827). However, he then reverted to tradition and included many references to real estate law especially in his section on duty to disclose defects. 2 KENT, *op. cit. supra* at 374-86.

40. The Sale of Goods Act, 56 & 57 Vict. c.71 (1893), is even wilder, since, not satisfied with warranties, it declares that certain quality obligations are "conditions," and there are different remedies according to whether it is a "condition" (the remedy is repudiation) (§ 11(1)(a)) or a "warranty" (§ 53) that was breached. This was supposedly required by previous English law (see n. 25 *supra*) but it need not be considered here. The entire development of a warranty has, needless to say, been greatly oversimplified in the treatment given to it here. As was indicated in the text, all the developments were taking place at the same time. There was no linear progression of any sort. The warranty decisions for England and two American states (New York and Pennsylvania) are analysed in great detail and with great refinement in Llewellyn, *On Warranty of Quality, and Society*, 36 COLUM. L. REV. 699 (1936), 37 COLUM. L. REV. 341 (1937). It was Prof. Llewellyn's belief that one found many conflicting tendencies among the cases, tendencies which he tended to divide into mercantile and non-mercantile, that is, cases in which the courts indicated an understanding of commercial realities and a willingness to give effect to them and those in which they did not regardless of doctrinal devices used to do this. He found considerable division among the English courts. Common Pleas being the most mercantile. He also tended to regard a "contractual" approach as the mercantile one. [See, e.g., his discussion of the New York judge, Cowan, 36 COLUM. L. REV. 699, 742-44 (1936).] With his analysis of the cases in this way, I would have no quarrel. I would only suggest that all the judges were consciously or unconsciously using a contract theory because the fact situation in front of them consisted of contract promises. The difference was in what contract they found out of the words and actions of the parties. In the second part of the article, 37 COLUM. L. REV. 341, 379-93 (1937), there is an interesting treatment of the relation between the Uniform Sales Act and the prior law as well as an analysis of the Act itself.

41. UNIFORM SALES ACT § 12.

42. UNIFORM SALES ACT §§ 13-16.

43. *E.g.*, MO. REV. STAT. § 442.420 (1959): "The words 'grant, bargain and sell,' in all conveyances in which any estate of inheritance in fee simple is limited, shall, unless restrained by expressed terms contained in such conveyances, be construed to be the following expressed covenants"

44. It keeps the distinction between express warranties (§ 2-313) and implied warranties (§§ 2-314, -315) but reduces the number of the latter to two—merchantability and fitness for purpose.

Thus, if there were no law of warranties, just a law of contract as we know it, and if Buyer and Seller agreed to buy and sell 100 bales of cotton or hemp or whatever and said no more about the nature of the goods than that, just the name—then what they are bargaining over probably is something that expresses what people mean when they use that term, in other words, goods that generally answer the description, or goods of “merchantable quality.” To put it another way, what must Buyer, as a reasonably prudent man, believe that he has to take and pay for? There is no question, after all, that this is a valid contract, that there are binding obligations to do something. But what would be the proper performance under the contract? Clearly nylon, or wool, or probably even used cotton fibres would not meet the contract description. Perhaps “ten bales of something which would pass generally in the trade under that description” would be a fair statement of what a court would regard as a reasonable interpretation of the words. This is what reasonable men in the position of Buyer and Seller would expect. If so, then using the objective standard of interpreting contracts, this is what the contract provides, and thus is what Seller must furnish or be in breach. This is precisely the result a court would reach if it asked, are there any words of description that are the basis of the bargain and hence constitute an express warranty?—or is there an implied warranty of merchantability? It would (or could) find that there are both.⁴⁵

And so with the warranty of fitness for a particular purpose. If B buys a cooling unit for his grocery store, he may talk about (or discuss in writing) what he wants with S's clerk or salesman. Again treating this as a contract and ignoring the law of sales, there will then be a question whether he agreed to buy whatever answers the description, Frigidaire Model 1057A, or whether the agreement is for a refrigerator which will cool x tons of meat to y degrees in a location where outside temperatures reach z . If there were no law of sales and there was a suit between B and S the court would have to decide which agreement had been made, but if the evidence indicates that there was a promise express or implied that the machine was to perform certain tasks, then the seller will be in breach if it does not. Under the Sales Act, Section 15(1) indicates, in effect, that if the buyer relies on the seller's judgment, then one assumes that the agreement which the parties made is that the article (such as a refrigerator) will do whatever B told S he wanted it to do. This is a reasonable enough assumption surely. And so

45. There is language in some of the earlier cases that is precisely in those terms. See, e.g., *Jones v. Bright*, 5 Bing. 533, 130 Eng. Rep. 1167 (C.P. 1829). Best, C. J., after saying there was an express warranty, went on to set out other principles of liability, notably merchantability: “If a man sells an article, he thereby warrants that it is merchantable” *Id.* at 544, 130 Eng. Rep. at 1172.

too, of course, of sale by sample.⁴⁶ If there had never been any sales law or Sales Act, what could the court say the seller's obligation was if the contract provided, "goods to be in accordance with sample" except that the seller must furnish goods that are in accord with sample? Even the provision of Article 15(4) which has caused such difficulty⁴⁷ can be construed this way. It was a presumption as to intent which was reasonable enough at the time it arose. In a day when brand-names were not too common, it was reasonable to assume that if B asked for an item by brand and not by generic name, then this fact had some significance, and hence that the brand was all that he was entitled to expect that his immediate seller would give him (this may have been an erroneous assumption as to the general intent even at the time, but one can see how judges might think that way).

This, surely, is what all these "warranties" mean—that parties will be held to whatever quality they agreed on, and distinctions between "express" warranties and the various implied warranties are largely meaningless.⁴⁸ At any rate it is easy to interpret them this way, and, so interpreted, they make sense. And most of the early cases, when looked at in this way, also make sense—

46. This does not, obviously, eliminate the problem raised in *Parkinson v. Lee*, 2 East. 314, 102 Eng. Rep. 389 (K.B. 1802), the case in which the goods are in accord with the sample, but because of the manufacturer's negligence, unknown to buyer or seller, the goods (in that case hops) have deteriorated so that they are no longer what the buyer, reasonably, thought they were when he agreed to buy them. This is solved by § 16, however, since it provides in § 16(c) that: "If the seller is a dealer in goods of that kind, there is an implied warranty that the goods shall be free from any defect rendering them unmerchantable which would not be apparent on reasonable examination of the sample." See also UNIFORM COMMERCIAL CODE § 2-313(1)(c).

47. It has caused some discussion anyway. See 1 WILLISTON, SALES § 236a (rev. ed. 1948). Though whether it has caused much practical difficulty may be doubted, *ibid.* See, e.g., *Green Mountain Mushroom Co. v. Brown*, 117 Vt. 509, 516-19, 95 A.2d 679, 683-85 (1953).

48. One of the reasons for the distinction, and, indeed, for all the trouble, arose, apparently, out of the forms of action. There was originally an action on the case, *warrantizendo vendidit*, available for breach of warranty. Ames, *History of Assumpsit* in 3 SELECT ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY 259, 266-69 (1909). Since *assumpsit* was not the exclusive promissory action at that time—or since warranty was not recognized as a promise—the real decision in *Chandelor v. Lopus*, Cro. Jac. 4, 79 Eng. Rep. 3 (Ex. 1603), was that this action which required the word "warrant" must be used. The only other action that was available was also in case, but for deceit. Hence, the oft-cited rules that one could recover either on the warranty or for fraud (e.g. Story, *op. cit. supra* note 22, § 349). Later, it was decided that the action "on the warranty" could be in *assumpsit*, *Stuart v. Wilkins*, 1 Doug. 18, 99 Eng. Rep. 15 (K.B. 1778), and the concept of "express" warranty was stretched very far, but apparently there had also been some stretching of the doctrine of fraud so that no scienter had to be proved. This was especially true of title. Out of this, it is said, implied warranties developed (Story *op. cit. supra* note 22, § 364). This history is perhaps a little dubious. Whether it is or not, the distinction clearly is, and has been regarded as such, though it has been maintained—even in the Uniform Commercial Code.

even the horse cases. In other words, if one says, what the court was really asking itself was, what would a reasonable man have thought that the seller promised to deliver, and not, was there a "warranty" of such and such a type, then one can see how a reasonably intelligent court could have held as it did on the facts. It was perfectly reasonable to assume that there was no obligation of quality in the sale of a horse (as today with the used car) unless something quite definite and explicit was agreed upon, unless there was a specific "warranty" clearly intended to operate as such. Buyers of horses did in fact (and with reason) beware. So the courts were right to assume they did.⁴⁹ Nor is it surprising, as has been pointed out, that the words warranty were used to describe the promise as to quality since the most easily available group of rules into which sales could be fitted were those that arose in real estate transactions where warranty was a common term. Since they had no readily available contract terms they used what they had and got reasonably good results—surely as much as one could expect. Though this is not to say that the courts always made the right assumptions. Especially in mercantile transactions it was likely that the judges would be completely unfamiliar with the world in which the contract arose; the only sales many of them knew anything about were such things as retail purchases or sales of horses, and they might transfer their assumptions to the minds of professional merchants who were selling shiploads of chemicals. But this will always be the case with any use of the "objective" standard (the standard is in fact that of the judges). It does not change the fact that what they were asking was the contract question. And indeed what else could they have done, since, after all, the parties could, legally, even then, agree to do anything, or almost anything, that they were likely to wish to do, and such

49. The opinions at the time seem to me to indicate this feeling. So even Gibson in *McFarland v. Newman*, 9 Watts 55 (Pa. 1839), one of the strongest opinions in favor of *caveat emptor*, seems to me to base his decision on what he thought it was reasonable of the parties to expect. Thus he wrote:

Though to constitute a warranty requires no particular form of words, the naked averment of a fact is neither a warranty itself, nor evidence of it. In connection with other circumstances, it certainly may be taken into consideration; but the jury must be satisfied from the whole that the vendor actually, and not constructively, consented to be bound for the truth of his representation. Should he have used expressions fairly importing a willingness to be thus bound, it would furnish a reason to infer that he had intentionally induced the vendee to treat on that basis; but a naked affirmation is not to be dealt with as a warranty, merely because the vendee had gratuitously relied on it; for not to have exacted a direct engagement, had he desired to buy on the vendor's judgment, must be accounted an instance of folly. Testing the vendor's responsibility by these principles, justice will be done without driving him into the toils of an imaginary contract. *Id.* at 60.

Though this is regarded generally as the statement of a position opposed to "warranty" which it doubtless is, surely it is evident that Gibson felt that one should look to the intention of the parties to see what contract they had, as reasonable men, entered into.

an agreement would control. Moreover the parties had, in fact, agreed to something, had promised.

Unfortunately, however, once the rules were shaped in this way—in the words of warranty—and the law began to crystallize, there was a tendency to take the statements literally as five (or seven or more) quite separate rules for occasions when a question of quality obligation arose. To take, in other words, the conveyancer's approach and concentrate on words and not on intent. At least that was the surface approach, yet few courts can have really ignored the issue of intent which was always present, since everyone admitted that the rules could be changed by a manifestation of a contrary intent (something that could not be done with many of the conveyancer's phrases though it could with some). This has led to some absurd contortions on the part of the courts. One of the most curious is the tendency to try to bring all cases within the rather special case of fitness for a particular purpose. Nowadays it is quite unusual for consumers in a large retail store to rely on the retailer's skill and judgment in selecting, say, Campbell's in place of Heinz's tinned chicken soup. Nonetheless this was assumed to be the only relevant warranty in an action for defective quality and Cardozo was regarded as a forward thinker (rightly enough) when he defined that in such a case the warranty one was "really" interested in was merchantability, and that bread with a pin in it was not merchantable.⁵⁰ Still, though it has been awkward, the courts have generally found quality obligations despite *caveat emptor* because, I would suggest, they realize that this is what the parties intend, and since the parties can agree to anything, the courts will tend to enforce the intent. How much easier, though, to say that this is what is being done.

III. OTHER SALES ACT PROBLEMS

The problems that have arisen because of the attempt to fit the contractual problems of sales into the conceptual framework of conveyancing are perhaps most graphically shown in the case of warranties, but there are many other instances. No effort will be made to treat these exhaustively here, but their general nature can be easily seen if the typical problems that arise in the case of sales are examined in the light of the Sales Act.

First, however, the contractual scheme must be set out. Essentially, there are three basic questions that must be asked in any case of an alleged breach of contract. What did the parties agree to do (formation)? What did they do (performance)? What can the aggrieved party do about it (remedy)? The rules of contract need, however, concern themselves only with the first

50. *Ryan v. Progressive Grocery Stores, Inc.*, 225 N.Y. 388, 175 N.E. 105 (1931). See Prosser, *The Implied Warranty of Merchantable Quality*, 27 MINN. L. REV. 117 (1943) where the whole matter is discussed.

and last, since the contract, when formed, will describe the performance which will be permissible.

If, then, sales of goods were regulated solely by contract law, there would need to be only the law of formation and that of remedies. Both of these branches of the law are quite simple. Within the rather broad limits of public policy, consideration, statute of frauds, and the like, the parties can agree to do anything they wish, and the courts will enforce their agreement according to its terms. (The "law" of contracts is related primarily to proof—what, if anything, have they agreed to do, or what can a court piece together out of a jumbled mass of disconnected data that it can say represents what they agreed to do).⁵¹ If this were contract law, in other words, Buyer and Seller could agree to exchange goods on any terms, and in any way that they wished, and if they did, and one party did not perform as he had promised to do, the other could be compensated in money.⁵² This compensation usually consists of the difference between the market price and the contract price.⁵³

If this were not to be contract, or promissory law, then one would expect to find rules setting forth the ways in which goods could be sold regardless of intent, along with other rules setting forth the consequences of violating the formation and performance rules.

How does sales law, as indicated by the Sales Act, fit into these schemes? Is it contract or not? At first glance, it would seem not. About two-thirds of it consists, after all, of rules on the performance of sales agreements. There are about ten sections on remedies and about the same on formation. It would appear then that the Act substantially ignores the intention of the parties, and instead prescribes the rules for the conduct of sales (or, as one might say, forms the contract as a matter of law). So there are provisions on auction sales,⁵⁴ instalment sales,⁵⁵ documents of title,⁵⁶ risk of loss,⁵⁷ delivery and acceptance⁵⁸ (very little on payment oddly enough).⁵⁹ But a

51. Or, for that matter, even if their agreement is apparently contained in a writing, what does this mean? But all the offer and acceptance material—the crossed wires, the mistake cases (which ship *Peerless*, etc.)—consists essentially of proof problems. There is no question that the parties could have agreed to what either is claiming the agreement was. The question is, what, if anything, did they agree to?

52. RESTATEMENT, CONTRACTS § 326 (1932).

53. RESTATEMENT, CONTRACTS § 329, illus. 1 (1932).

54. UNIFORM SALES ACT § 21 (1932).

55. UNIFORM SALES ACT §§ 27-40 (1932).

56. UNIFORM SALES ACT § 22 (1932).

57. UNIFORM SALES ACT §§ 43-46 (1932).

58. UNIFORM SALES ACT § 48 (1932).

59. UNIFORM SALES ACT § 42 (1932) states that delivery and payment are concurrent conditions, and §§ 47, 48 define acceptance, but there is nothing detailing the modes of payment, cash, credit, etc. *But see* § 52b on conditional payment.

closer look reveals quite a difference. In the first place, much of the act can be eliminated since it does not have too much to do with sales. Thus the provisions on writings are simply a rewriting of the relevant provisions of the Statute of Frauds.⁶⁰ The article on minors' contracts for necessities is simply a restatement of the general rule.⁶¹ The provisions on the rights of creditors to get at the interests of buyer and seller have no special bearing on the relations between buyer and seller.⁶² Nor is there a pressing reason why the whole body of rules regarding documents of title should appear in a sales act⁶³ any more than the law of negotiable instruments, since the parties presumably use checks as often as they do warehouse receipts.

Moreover, if one looks at the rules which do purport to regulate sales, some rather curious impressions emerge. So there is almost nothing in the section labeled "Formation of the Contract" which deals with the problems of formation of contracts.⁶⁴ If, however, one turns to "Performance," one sees that the first section (41) states:

Seller must deliver and buyer accept goods.—It is the duty of the seller to deliver the goods, and of the buyer to accept and pay for them, in accordance with the terms of the contract to sell or sale.

As one thinks about it, it seems fairly clear that unless this section is limited by others, it provides, in effect, that sales law, at least as regards formation,

60. *E.g., compare* UNIFORM SALES ACT § 4 with RESTATEMENT, CONTRACTS, §§ 178(1)(VI), 199-206 (1932).

61. "Section 2. Capacity—Liabilities for necessities.—Capacity to buy and sell is regulated by the general law concerning capacity to contract, and to transfer and acquire property.

Where necessities are sold and delivered to an infant, or to a person who by reason of mental incapacity or drunkenness is incompetent to contract, he must pay a reasonable price therefor.

Necessaries in this section means goods suitable to the condition in life of such infant or other person, and to his actual requirements at the time of delivery."

As to the second two paragraphs, see the general rule in 1 WILLISTON, CONTRACTS §§ 240, 241 (1st ed. 1920)—the edition most nearly contemporaneous with the Sales Act.

62. UNIFORM SALES ACT § 25, sale by seller in possession of goods already sold; § 26, creditor's rights against sold goods in seller's possession; §§ 54-56, unpaid seller's lien. These would seem to be more problems for the law of creditors' rights.

63. UNIFORM SALES ACT §§ 27-40.

64. There are, in the part so labeled, only two sections—§ 1 which defines sales and contracts to sell and § 2 dealing with capacity and liability for necessities. If one considers all of Part I, it includes forms (seals and such) § 3; statute of frauds, § 4; provisions permitting sales of future goods (§ 5) and undivided shares in goods (§ 6); provision on destruction of goods sold (§ 7) and of goods contracted to be sold (§ 8). There are provisions on how price may be determined with and without specific agreement (§§ 9-10—these are quite liberal). And finally conditions and warranties, §§ 11-16. Of all these only the warranty and price provisions seem to me to be of much importance. There is nothing in the section on what is to constitute assent, a binding offer, consideration, etc.

is governed by contract. That whatever the parties agree to do is what they are bound to do. As one looks further into the Act it is clear that the provisions regulating performance do not really limit this contract theory since the great majority apply only "unless otherwise agreed."⁶⁵ There are a few sections which do not,⁶⁶ but all of these are closely connected with remedies for breach—such as buyers' rights and duties when seller delivers the wrong quantity of goods.⁶⁷ Even the sections on the passage of title⁶⁸ and risk of loss⁶⁹ are "unless otherwise agreed." Furthermore the remedies sections, are, when looked at closely, simply restatements of contract rules—with three exceptions: the seller's lien⁷⁰ and his action for the price,⁷¹ and the buyer's somewhat similar remedy for conversion.⁷²

The Sales Act provides, then, insofar as it deals with the relations between buyer and seller, that the parties can govern themselves by agreement, but that, in the absence of clear provisions in the agreement, certain presumptions apply as to what has been agreed upon as regards the performance which will be required. In the event of breach, the normal contract remedies are available. This fact is not apparent, however, from a cursory examination of the statute, as it was not in the case of warranties.⁷³ The presumptions

65. The provisions on price (UNIFORM SALES ACT §§ 9-10) pretty much leave matters up to the parties as do § 43 "Place time and manner of delivery" and § 45 "Delivery in instalments"; the problem of whether delivery to carries is delivery to buyer (§ 46); Buyer's right to examine goods (§ 47); whether acceptance bars action for damages (§ 49); whether a buyer who rightfully rejects goods must return them (§ 50); Seller's right of resale in case of default by Buyer (§ 60).

66. The section on capacity (§ 2), contracts for the sale of future goods and undivided shares (§§ 6-7); destruction of goods (§§ 7-8); sale at a valuation (price to be set by a third party who fails to act) (§ 10); the passage of property in unascertained goods (§ 17); sale by auction (§ 21); sales by one not the owner and fraudulent conveyances (§§ 23-26); delivery of wrong quantity (§ 44); right to examine goods (in party) (§ 47); what constitutes acceptance (§ 48); buyer's liability for failure to take delivery and seller's right of resale (§ 60).

67. UNIFORM SALES ACT § 44.

68. UNIFORM SALES ACT §§ 18, 20, though as pointed out above, passage of title is subject to the requirement that the goods be ascertained.

69. UNIFORM SALES ACT § 22.

70. UNIFORM SALES ACT § 53 (1).

71. UNIFORM SALES ACT § 63.

72. UNIFORM SALES ACT § 66.

73. The seller is given damages for non-acceptance, these being the estimated loss directly and naturally resulting from the buyer's breach of contract, which is normally the difference between contract price and market price (UNIFORM SALES ACT § 64). He may also rescind under the usual circumstances (§ 65). Where title has not passed, the buyer may bring an action for damages normally resulting (which will usually be the difference between contract price and market price) for non-delivery (§ 67) or breach of warranty (§ 69). Though in the latter case, he can also rescind, or refuse to accept the goods, and sue for damages, and he can sue for damages even if title has

as to intent look like rules of law and are often interpreted and discussed in that way, just as are the warranty sections. Also, like the warranty rules, many of them are clearly derived from the law of real property conveyancing, and others are based on assumptions (frequently erroneous) as to the normal intentions of parties to sales contracts. Indeed, the difficulty with the Sales Act (and the cases on which it is based) is, it seems to me, that it is so largely based on two erroneous assumptions. The first is that passage of title is central to the sale. The second, that most sales are face-to-face, immediate-delivery-for-cash transactions.

That the law is framed by these two theories is understandable enough historically as was the case with the similar warranty rules. Thus as to the first, if a court is accustomed to think of conveyances of land when it thinks of sales, then it is natural that the passage of title will assume great importance. In the case of sales of interests in land, title will always be important. While the buyer wishes primarily to get possession of, or anyway the income from, Blackacre, he is almost certainly very interested in getting "good title" as well. Furthermore, to the analytical mind that is interested in building (or finding) a neat and harmonious system in the law, title must seem heaven-sent. It is abstract, entirely mental, and hence can be manipulated easily, yet it has an almost tangible quality for most minds so that no one is upset by its abstractness. The result is that a very pretty structure indeed has been formed. There are elaborate rules for the passage of title in the absence of specific agreement⁷⁴ and this passage is, of course, quite independent of the goods which may be in the middle of the ocean whereas the parties are in London.⁷⁵ If one knows who has title, one knows who bears the risk of loss (the owner naturally⁷⁶), what remedies the buyer and seller and their creditors have,⁷⁷ etc.⁷⁸ It is like a rather arcane sort of board game such as three-dimensional chess. The only problem with all this is that, in the first place, title is usually quite absent from the parties' minds (the dickering is usually over price and delivery), and in the second place because

passed. He can elect only one remedy: if he chooses damages, for example, he cannot rescind. All of these are, of course, contract rules.

74. UNIFORM SALES ACT §§ 17-19.

75. It is a commonplace that title can be transferred independently of possession. A typical example is *Smith Co. v. Marano*, 267 Pa. 107, 110 Atl. 94 (1920) in which a Philadelphia Buyer was held to have acquired title when goods were placed on board a ship in Newfoundland by the Seller, the only contract between Buyer and Seller having been by letter and telegram.

76. UNIFORM SALES ACT § 22.

77. See note 73 *supra*.

78. See Llewellyn, *Through Title to Contract and a Bit Beyond*, 15 N.Y.U.L.Q. REV. 159 (1938) for a discussion of the varied uses to which title mistakenly in his view is put.

of its elusive and abstract nature, title is awfully hard to pin down, and the presumptions are so worded that a plausible case can always be made that title is anywhere that it may be useful for the speaker to place it. Consequently, title does not, in fact, determine the results of cases, but is one of those concepts that are manipulated to explain a desired result which has in fact been reached because of some other reasons. What has happened, essentially, is that the conveyancing concepts surrounding equitable title, especially equitable conversion, have been refined somewhat and transferred to chattels with the distinction between legal and equitable title abolished.⁷⁹ The result is a neat, easily comprehensible system that is quite unworkable, and hence is ignored.⁸⁰

The second—to my mind erroneous—assumption as to the nature of the sales does not derive from conveyancing, though it does arise from the types of sales that one thinks of farmers, and for that matter judges, as making.⁸¹ This is the ordinary retail sale in which the buyer goes to the seller's place of business, selects the goods, pays for them in cash, and takes them home with him. It is, of course, a type of transaction which takes place in great numbers all the time, now as then, and the totality of such transactions is of very great importance. But individual transactions of this sort are normally of no particular importance, certainly no commercial importance. Merchants (including many farmers) do not, and did not, conduct business en-

79. Of course the elaborate and rigid scheme of legal interests is land which resulted perhaps from the concept of seisin and the real actions has never had an exact counterpart in the law relating to interests in chattels. And certain aspects of the sales law which refer to title are doubtless derived from the actions that were restricted to chattels. So the Seller's action for the price would seem to be related to the action of debt. See Ames, *Parole Contracts Prior to Assumpsit*, 3 SELECT ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY 304, 310-12 (1909). But it looks too much like the Vendor's action for specific performance not to have some connection with equitable doctrines of real property sales which were, after all, much more refined than those that had to do with chattels, and for obvious reasons. See 7 HOLDSWORTH, THE HISTORY OF ENGLISH LAW 468-70 (1926). The fact that title passes instantaneously on the making of the agreement (§ 19, rule 1) is after all, simply a restatement of the basic rule of equitable conversion. On the development of equitable conversion, see Bordwell, *Equity and the Law of Property*, 20 IOWA L. REV. 1, 28-29 (1934).

80. See Llewellyn, *supra* note 78. See also *L. Albert & Son v. Armstrong Rubber Co.*, 178 F.2d 182 (2d Cir. 1949) discussed note 85 *infra*.

81. Judges are, by definition, not businessmen, and from the nature of the organization of the profession in this country they are unlikely ever to have spent much time in commerce. This was true also in England in the 18th century during the formative period of English (and hence American) commercial law. For a description of the educational system see 12 HOLDSWORTH, HISTORY OF ENGLISH LAW 77-91 (1938) and for the life of attorneys and solicitors see ROBSON, THE ATTORNEY IN XVIII CENTURY ENGLAND 52-83 (1958), though some had, as attorneys, much contact with commerce, *id.* 9, 76-7.

tirely in this way.⁸² They frequently never see the goods, and as often as not do not see each other, cash is unusual; the seller normally ships to the buyer. Consequently, law suits involving merchants will often not fit into this pattern, nor, of course, will the affairs of the only group (merchants) likely to consult lawyers before engaging in sales (not that they are *very* likely to). To be sure, the act recognizes that not all sales are of this sort, and has other provisions for cases where, for example, the goods are to be sent to the buyer.⁸³ But at the very best, such provisions are awkward because of the fact that they are exceptions (*e.g.*, delivery to carrier is delivery to buyer, unless the goods are not in accordance with the contract, in which case it is not, or rather was not, since the quality will not, of course, be known until arrival.⁸⁴) And they can give rise to quite unfortunate results.⁸⁵

82. As to past practice, see note 13 *supra* and see notes 97-98 *infra*.

83. UNIFORM SALES ACT § 46.

84. *Ibid.*

85. The whole subject of the troubles with traditional sales law was so exhaustively treated in Llewellyn's article (*supra* note 78) that there seems to be no need to go into the matter at length here. Anyone interested in looking into the situation will find innumerable examples there. But it may be worthwhile to show how even the best judges could get tangled up in this morass and appear at something less than their best. So Learned Hand, in *L. Albert & Son v. Armstrong Rubber Co.*, 178 F.2d 182 (2d Cir. 1949). The case was an action for the price of four "refiners" designed to reprocess used rubber. The contract (evidenced by exchange of letters) was executed in December 1942. Two refiners were delivered in 1943, and the other two after 31st August 1945. The Buyer claimed that he had rejected all four in October 1945, and counterclaimed for Seller's breach of contract (the breach consisting of delay in delivery). The trial court dismissed both complaint and counterclaim, but gave judgment to the Seller for a part of the equipment which had been used. There was a good deal of contact between Buyer and Seller on the subject of delivery of the second two machines. The Buyer wrote on 28th March 1945 that he still wanted the two machines. The Court of Appeals agreed that delivery could have been made within a reasonable time thereafter, but that September was too late. The issue, one would have supposed, since this was an action for the price, was whether "title" had passed to the Buyer (§ 63 of the Sales Act). This point was, however, never raised or discussed. Instead, Seller argued that it was entitled to the price because the Buyer had (1) intimated it had accepted; (2) done an act with the machines inconsistent with the ownership of the seller; (3) retained them for more than a reasonable time, and hence had "accepted" the goods in accordance with § 48 of the Sales Act—a concept (acceptance) which is irrelevant (one would have thought) to the action brought. The Buyer had, after the last two machines were delivered, written to the Seller asking that it confirm the claim against it (the Buyer) as being \$25,500, the full purchase price. Hand decided that this did not indicate an "intimation of acceptance" because in the previous year the Buyer had asked that Seller confirm the price of the first two machines which would tend to indicate that the Buyer intended to separate the contract, and it later appeared (it is not quite clear to me how or when) that this was not the Buyer's intent. Hence Seller could not rely on the second letter as an intimation of acceptance and anyway, the Seller, who had the burden of proof, did not show that the acceptance, if it was one, came before the Buyer's repudiation which "certainly could not be understood as a retraction." The Buyer also depreciated the machines on his books

It would seem then, that a so-called law of sales, independent of the law of contract, exists more or less as an accident. At the present time, contract law could provide, and as a matter of fact, does provide, the basis for the law of both formation and breach. The bulk of the law of sales, so-called, consists of presumptions as to what parties have agreed to in the absence of clear indications of contrary intent. The only utility of separating sales law from the rest of contracts would be if those presumptions were in fact fairly accurate indications of what merchants were likely to intend, if, as is commonly the case, they have not made their intentions clear. Since judges are not normally very familiar with commerce, such a body of rules could be very helpful. Unfortunately, just the reverse is the case. The presumptions are contrary to the probable intent of merchants, to the normal facts of the case, and hence are a hindrance rather than a help to decision. This leads one, of course, to ask how the Uniform Commercial Code provisions on sales compare with the Sales Act when viewed in this light. Before looking at these code sections, however, it would be well to look further into the subject matter of those provisions, into the sales themselves.

IV. THE SALE TRANSACTION

Sales, for these purposes, may perhaps best be divided into two main groups: sales of goods other than automobiles to private consumers and sales to merchants. Once automobiles and similar items such as tractors and farm machinery are excluded from consideration, it is clear that consumer

preparatory to reporting this depreciation as a deduction on his tax return, but "it does not interfere with a seller's ownership to make an entry upon the buyer's books that the goods are the buyer's." And this would be so even if Buyer got the claim allowed by Internal Revenue. And besides, Seller did not prove that this took place before the retraction (whose date no one seemed to know). Finally the Buyer used parts of the refiners (a motor and accessories) in February 1946. The court decides that this use does not retract the "unconditional unequivocal rejection of the goods" (the rejection whose circumstances are not divulged by the court). Then there was the fact that the Buyer waited at least a month to reject. The court rejected this argument out of hand.

Clearly the basis of the court's decision is that the Seller waited to deliver until after V-J Day after which the machines had almost no value, and in consequence the court felt that it would be most unjust to permit him to recover the price (how the court would have reacted to an action only for the first two machines is not clear since the trial court had decided that the contract was inseparable and the plaintiff did not dispute this point on appeal.) The court also had a fair amount of difficulty in dismissing Buyer's counterclaim but this was primarily due to some Connecticut decisions, so I shall let this part of the opinion pass. The result reached by the court was almost unquestionably the proper one, but they received no help from the Sales Act (or so it seems to me), and the opinion is a tortured one that could only be unhelpful at best to any subsequent lawyer or judge who looked to it for guidance. Yet this opinion was by one of the best commercial courts that ever sat in the United States, to say nothing of the quality of the judge who wrote the opinion.

sales are those that deal with amounts of money so small that any litigation involving them will normally fall within courts of limited jurisdiction—magistrates, small claims, J. P. courts, etc. Any litigation, with one notable exception, the products liability cases, will arise in these courts. And so one might further divide cases arising from consumer sales into two categories: product liability cases and ordinary consumer sales cases. The other sales are those which one might call sales between merchants using that term roughly in the sense of the Uniform Commercial Code.⁸⁶

What is the influence of sales law and hence the Uniform Commercial Code on these three types of sales? One can eliminate from consideration immediately the first group which is by all odds the most important financially. There are a number of reasons for this. In the first place, as indicated above, any legal action would almost certainly take place in one of the lesser courts. These courts pay little attention to "law," whether case or statute, and there are few appeals from their judgments. Actions would, in any event, almost invariably be by the seller for the unpaid portion of the purchase price and judgment is probably usually by default.⁸⁷ This leads to the second reason. If the seller is a reputable merchant such as a typical big-city department store, a mail order house, or similar concern, its returns policy will be so liberal that any complaints that the buyer may have about the goods will almost certainly result in his being able to return them for credit or have them replaced.⁸⁸ Consequently actions by consumer buyers will be almost non-existent. If the buyer does not complain, and does not pay, and ignores the store's collection efforts to the point where suit is begun, and does not himself sue or counterclaim, it is unlikely that he will resist much the entry of judgment against him or its execution thereafter, and if he does not there will be no appeal and not even any purported application of sales law to him. Hence these sales will not, except in fluke (*e.g.*, spite) cases be affected by sales law as the term is generally used. Consequently

86. UNIFORM COMMERCIAL CODE § 2-104(1).

87. See St. Louis Post Dispatch, January 16, 1963, in which appears one of a series of articles on the problems of consumer credit, an analysis of the work of the Magistrates Courts in the City of St. Louis [jurisdictional limit \$2,500; Mo. REV. STAT. 482.230 (1959)]; the great bulk of the cases involve debt collection in one form or another and the presiding magistrates estimated that less than one per cent of the cases were appealed to the Circuit Court (the trial court of general jurisdiction). It was also reported that the nine magistrates frequently dispose of 250 cases in a three-hour morning session. There seems to be no reason to suppose that St. Louis is untypical of American cities.

88. See National Retail Dry Goods Association (Store Management Group), Customer Returns and Complaints (n. 11). Nor is the problem or attitude limited to retail sales. For wholesalers, see BECKMAN, WHOLESALING 412-14 (rev. ed. 1951). And for an interesting report on manufacturers' attitudes toward returns, see Macaulay, *Non Contractual Relations in Business: A Preliminary Study*, 28 AM. SOC. REV. 55, 60-62 (1963).

they can be ignored in any treatment of sales law since it will scarcely ever be applied to them.⁸⁹

There is one area where consumers do sue, of course, and this is that of products liability cases. The primary problem here, however, is privity, or whom to sue. A plaintiff in a breach of warranty action, if he has the proper defendant and can prove cause—that the nervous prostration was the result of the plaintiff's seeing that the sandwich she was biting down on was full of maggots—can recover without more proof. Since he can almost universally recover from any individual in the chain of distribution if he can prove fault or negligence, allowance of recovery against any person in the chain under a warranty theory means an imposition of non-fault liability where before there was recovery only for negligence. This can be and is accomplished in other ways—by, for example, the extension of *res ipsa loquitur* or simply by the imposition of liability on the explicit grounds that public policy requires producers to assume this liability as part of the cost of doing business. This is, in any event, the dominant factor governing the court's decisions whichever way they may decide and whatever may be the legal cloak, and they frequently indicate as much.⁹⁰ These cases are, in consequence, decided in the context of tort and not sales law—even to the extent that it is the personal injury lawyers who try them.⁹¹ And while the distinction between tort and contract is admittedly a hard one to draw on

89. Professor Llewellyn seemed to feel more or less this way at first. See LLEWELLYN, *CASES ON SALES* xiv (1930). But he recanted a bit later on. See Llewellyn, *supra* note 78, at 159, 164 n.6. Much of what he regarded as significant about "sales" law in consumer sales was the law of conditional sales, and under the Uniform Commercial Code framework such problems are, of course, considered in art. 9. In any event, it seems to me that no one could seriously dispute the statements made above, at least as to urban areas. In small towns, things may be different, although the small town is to a very considerable extent ceasing to exist as an independent marketing area (because of chain stores, mail order houses, and easy automobile transportation to neighboring cities).

90. See *Henningsen v. Bloomfield Motors, Inc.*, 32 N.J. 358, 161 A.2d 69 (1960) where the court, in imposing liability on the manufacturer, said that the Buyer's remedy "should not depend 'upon the intricacies of the law of sales. The obligation of the manufacturer should not be based alone on privity of contract. It should rest, as was once said, 'upon the demands of social justice.''" *Id.* at 384, 161 A.2d at 83. And see, for subsequent developments, 63 COLUM. L. REV. 1522 (1963).

91. It is interesting to note that the Torts treatises all treat this matter extensively. See PROSSER, *TORTS* 506-11 (2d ed. 1955) and 2 HARPER & JAMES, *TORTS* §§ 28.15-28.33 (1956). Moreover, Commerce Clearing House publishes THE FOOD DRUG COSMETICS LAW REPORTS and PRODUCTS LIABILITY REPORTS, both substantially devoted to this subject. This is to say nothing of treatises such as FRAMER AND FRIEDMAN, *PRODUCTS LIABILITY* (1961) and GILLAM, *PRODUCTS LIABILITY IN THE AUTOMOBILE INDUSTRY* (1960) etc., all of which deal with both "tort" and "contract" (warranty) theories.

the edges, there seems to me to be some validity in maintaining it generally. In any event these cases can also be excluded from consideration.⁹²

One comes finally to automobiles. These may, of course, give rise to products liability cases in which case the same ideas apply as in the case of other consumer sales. Otherwise, however, sales law unquestionably applies, or may. To speak only of new car sales, they are usually in excess of \$10,000,000,000 a year.⁹³ Almost the lowest price for such a car is \$2,000, and most sell at more than that. Hence one is in an area beyond the small claims court. Moreover, returns policy is not liberal. Sellers try in every way to limit their duties.⁹⁴ In some very curious ways, as a matter of fact, the sale of the automobile is the only one which follows the classical model. Delivery is at Seller's place of business for cash or very carefully pre-arranged credit terms. There will invariably be a writing containing most of the essential elements of the contract including explicit "warranties" so named. Finally, passage of title is a matter that is very much discussed (though it is probably misunderstood).⁹⁵ Nonetheless, sales of automobiles must, it is believed, be considered separately from all others (and will not be considered here) because the mechanics of sale involving as they do the certificate of title,⁹⁶ and, if there is any credit, very special regulations,⁹⁷ are quite different from the sale of, say, a dress or a can of beans. There do not seem to be enough cases to make the omission a serious one.

92. They (or most of them) are firmly eschewed by the Uniform Commercial Code (in its final form) which leaves the privity problem generally up to "the developing case law." § 2-318, comment 3.

93. Passenger car sales in 1961 were of 5,542,707 vehicles with a total value of \$10,285,777,000. 1963 WORLD ALMANAC 694.

94. See *Henningsen v. Bloomfield Motors, Inc.*, note 90 *supra*, where the whole subject of manufacturers' warranties and disclaimers is discussed, it may be noted, in a manner which must, on the whole, have made unpleasant reading for manufacturers. For subsequent developments on disclaimers, see Note, *Disclaimers of Warranty in Consumer Sales*, 77 HARV. L. REV. 318 (1963).

95. The "title" which car dealers and purchasers speak of is the Certificate of Title (*cf.* authorities cited note 96 *infra*) which may or may not be in the same hands as "title" properly so-called. In other words, the Uniform Sales Act might provide under § 19(1) that property in the goods passed on the signing of the contract, but the buyer will not get the Certificate of Title until he has paid and got delivery, and probably not then because of the formalities attendant on having it issued by the appropriate state office.

96. On this, see generally, *Security Interests in Motor Vehicles under the Uniform Commercial Code*, 70 YALE L.J. 995 (1961); Silverstein, *The Effect of Motor Vehicle Registration Statutes on Security Transactions and Recordations*, 1951 WASH. U.L.Q. 539.

97. See Warren, *Regulation of Finance Charges in Retail Installment Sales*, 68 YALE L.J. 839 (1959); Hogan, *A Survey of State Retail Installment Sales Legislation*, 44 CORNELL L.Q. 38 (1958). Currently there is an effort to regulate credit sales by federal statute sponsored by Senator Paul Douglas (the Truth in Lending Bill, S. 750, 88th Cong., 1st Sess. (1963)).

This leaves for consideration all the other sales—merchants' sales as they will be called here. To these of course sales law applies. Their variety is almost infinite and their number enormous.⁹⁸ Many of them involve immense quantities of money. One has only to think of the purchase of fuel by a large factory or of fruit by a large cannery or freezer company, to say nothing of government contracts (missiles are chattels that are sold, after all). To categorize them usefully is probably impossible. At any rate, no effort will be made to do so here. But these merchants' sales must be considered in the light of one further fact which almost everyone knows but no one says much about. This is that there is not much litigation involving sales, even these. The precise figures are not available, but everyone seems to agree that in state courts the great bulk of the civil docket involves personal injury.⁹⁹ This does not leave much room for commercial law. If one can assume that the business of appellate courts as revealed by the reports bears some relation to that of the trial courts, they do very little sales litigation at all and the amount grows ever smaller.¹⁰⁰ It is difficult to say just what this means beyond the fact that disputes involving sales are not likely to be litigated.

But this fact has certain consequences for the impact of law on sales. It means, probably, that a lawsuit is not a likely alternative for a businessman involved in a dispute. This is not to say that it is not *an* alternative—"you'd better, or by God I'll sue"—is perhaps a phrase that lurks beneath anyone's consciousness. But it is not normal. The strong tendency will be towards informal negotiation (or, in a few rather special areas, arbitration); towards settlement by dickering usually conducted over the (frequently long distance) telephone. The lawyer will not be involved until the negotiations have broken down, and this will, in the case of any single client, not happen very often. It is also probable that the lawyer was not called in when the contract was negotiated unless it was a very large one. It is possible, of

98. In 1958, wholesale transactions—which by definition are between merchants—in the United States amounted to \$284,970,807,000 by 285,996 establishments. 3 BUREAU OF THE CENSUS, DEP'T OF COMMERCE, CENSUS OF BUSINESS 1958 at 2-3 (1961).

99. See Macaulay, *supra* note 88, at 61-62.

100. In 1936 Prof. Mentschikoff stated that reported sales cases in the West digest system had dropped from between 1½% and 2% in the period 1906-26 to less than 1% in 1933-34. See Llewellyn, *On Warranty of Quality, and Society*, 36 COLUM. L. REV. 699, 706 n.24 (1936). In 1962, my count shows them at roughly between 0.7% (vols. 17 & 19 West General Digest 3d ser. 1962) and 0.8% (*id.* vol. 18). Conditional sales material constitutes something over 20% of the total. In the ten year period 1945-55, (approximately) there were, in Missouri, a total of 75 sales cases reported in the four state appellate courts, and 20 such cases in the federal courts in Missouri. Only 17 in all represented sales to merchants. Jones, *Merchants, the Law Merchant and Recent Missouri Sales Cases, Some Reflections*, 1956 WASH. U.L.Q. 397, 400-09.

course, that at some point in the transaction some invoices or forms will be used with which a lawyer had something to do at one time. Usually, however, they were drafted for all cases of this type (*e.g.*, the manufacturer's warranty), and not for a particular contract, and many of them were not in any real sense drafted, having simply been lifted out of some form book. At any rate, in any given transaction, the lawyer is not likely to appear on the scene until shooting is about to begin. His only other appearance will probably be to draft forms.¹⁰¹ In other words, the lawyer will normally be considering these problems (with which he may be relatively unfamiliar, one might add, as compared, say, to tax) either with a view to preparing a case for trial, or with a view to drafting an instrument which will give his client as many advantages as the law permits. How does the Uniform Commercial Code fit into this situation?

V. THE UNIFORM COMMERCIAL CODE

At first blush the Code appears to differ both from the property-oriented sales law, and from the contractual approach which is suggested here. Instead, it establishes a very elaborate and extensive set of rules to govern every aspect of the sales transaction. There does not seem to be any basic concept unless it is commercial good faith. But that, it seems to me, is the basic concept, and offers, or can offer, a very useful approach to the whole problem, for if one examines Article 2 of the Uniform Commercial Code with care, one sees that most of its provisions can be varied by agreement and everything, including the agreement to vary, is subject to the general obligation of good faith.¹⁰²

Every provision of Article 2 seems to be designed to encourage a decision which is in accordance generally with what the author believed to be reasonable commercial standards. So, even in the Statute of Frauds provisions (which were included only because the author felt businessmen expect that there will be a writing in sales of any size),¹⁰³ there is a provision that if one party sends a signed memorandum to the other, the second party (if he is a

101. This omits, of course, all consideration of products liability cases.

102. UNIFORM COMMERCIAL CODE § 1-203.

103. For Prof. Llewellyn's views as to the necessity of writings because of the general understanding of the business community, and as to the types of writings required, see his statements in 1 REPORT OF THE NEW YORK LAW REVISION COMMISSION 163-65 (1954). See also *The Statute of Frauds and the Business Community: A Re-appraisal in Light of Prevailing Practices*, 66 YALE L.J. 1038 (1957) where a report is given of an investigation made by the editors of that periodical on the practices of 200 Connecticut businessmen. From this survey it appears that the drafters of the Code were correct in believing that businessmen expect a writing in matters that involve much money, but that the nature of the writing should be changed somewhat.

merchant) will also be bound unless he objects within a reasonable time,¹⁰⁴ a provision which has no reference to the present law but which makes a good deal of sense. There are innumerable changes in traditional contract as well as "sales" law on such matters as firm offers,¹⁰⁵ or indefinite contracts,¹⁰⁶ and all are in the direction of having the law make more sense in commercial transactions.¹⁰⁷ Moreover, most of the provisions of Article 2 are expressly or impliedly subject to variation by the parties or by commercial usage.¹⁰⁸

104. UNIFORM COMMERCIAL CODE § 2-201 (2). The recipient is given ten days in which to object to its contents.

105. UNIFORM COMMERCIAL CODE § 2-205.

106. UNIFORM COMMERCIAL CODE § 2-204.

107. The best citation would probably be Art. 2 *passim*. But one can get an idea of the approach just from the offer and acceptance material. In addition to declaring that offers declared by merchants to be irrevocable are in fact irrevocable (§ 2-205), and to permitting a considerable amount of indefiniteness in the making of the contract (§ 2-204), the Code does away with the old rules that acceptance might have to be made in a certain way (as by letter) merely because the offer had been made in that way. It substitutes instead the concept of reasonableness in all these cases.

108. The basic presumption is that provisions can be varied by agreement except as provided specifically in the act and subject to the general requirements of good faith and the like. § 1-102 (3), (4) and comments. Moreover, course of dealing and usages of trade generally control the relations between parties. § 1-205, course of dealing and usage of trade; § 2-208, course of performance to be used in construing contracts. And see § 2-303, allocation or division of risks. Almost more striking are, however, it seems to me, §§ 2-718 and 2-719 which permit the parties generally to provide for whatever remedies they wish. Taking these provisions in combination, it is clear that almost all the rules of the Code can be varied to meet either the express desires of the parties or changed ways of doing business subject to the general requirements of reasonableness and good faith. There are, of course, a few sections that cannot be varied, but very few. The requirements of a writing (§ 2-201) and the parol evidence rule (§ 2-202), and the provision declaring seals to be inoperative (§ 2-203) are examples. By § 2-309(3), unilateral termination of an agreement requires reasonable notification of the other party, and an agreement dispensing with such notification is invalid if unconscionable (which still leaves the matter somewhat fluid, of course, since it would be permissible to show that in the particular trade or relationship it was not unconscionable). Disclaimer clauses excluding or modifying warranties are regulated somewhat, (§ 2-316) but with the exception of the requirement that the warranty of merchantability can be excluded only by the use of that word, (§ 2-316(2)) the total effect of the sections is to impose a requirement of reasonableness. The seller cannot, under § 2-318, exclude from the warranty persons in the household of the buyer.

There are several other provisions which primarily affect the interests of outsiders to the sales transactions—such as creditors of either party—which cannot in all probability be varied too much by agreement between the parties. So the rights of the creditors of a purported consignee (§ 2-326(3)); the rights of seller's creditors against sold goods (§ 2-402) and also (§ 2-403), (the power to transfer goods, the problems of the BFP and the like). As pointed out above, under §§ 2-718 and 2-719, the remedies available to the parties can generally be changed by agreement between them, and under the formation provisions, such agreements can as well be made by course of dealing and usage of

Hence there is nothing in the Code to prevent one from using a "contractual" approach to sales problems. Quite the contrary, there is, as a matter of fact, much in the Code to make such an approach especially rewarding and to point the way to future developments. The Code was, after all, the product of years of surveys of the practices and needs of businessmen¹⁰⁹ all seen through the quite astounding ability of the Chief Reporter to understand the ways and needs of commerce, especially in the field of sales.¹¹⁰ Thus when it provides that upon notice of rejection (breach) Buyer may "cover," this represents clearly the belief by the drafters that this is what the average buyer would want to do and what a reasonable seller should expect.¹¹¹ Is it not reasonable, then, to suggest, as a general approach to the Code, that it provides that, for the most part, buyers and sellers may do as they wish, and that since they frequently do not specify what they agreed to do, the Code provides presumptions as to what seems to be reasonable conduct under the circumstances. Such presumptions would yield to evidence of a contrary state of mind between the parties in fact, or to a different commercial understanding in the trade. If, in future years, it should develop that the suppositions of the Code are, because of changed economic conditions, or for any other reason, changed, then it should be possible for a state-

trade as by express language. Which is not to say that courts would or should be quick to permit variances in the Code provisions, but simply that they can. Certain provisions would require very strong evidence. See, *e.g.*, § 2-609, Right to Adequate Assurance of Performance, § 2-612, Installment Contracts (especially subsection 1); § 2-613, Casualty to Identified Goods and § 2-614, Substituted Performance and § 2-616, Procedure on Notice Claiming Excuse Because of Failure of Presupposed Conditions. It seems so unlikely that the Seller's right of stoppage in transit (§ 2-702) would be varied by agreement between the parties (such an agreement would require the seller to say in effect, I will not attempt to retrieve goods that I have sent to you if you become insolvent) that it is difficult to say whether it could be varied or not. Apart from such situations, however, the situation is obviously very fluid, and susceptible to radical change without amendment of the statute.

109. UNIFORM COMMERCIAL CODE, Preamble, comment. See also Llewellyn, Statement to the Law Revision Commission, 1 REPORT OF THE NEW YORK LAW REVISION COMMISSION 5-18 (1954); statements of Mr. Snee, *id.* at 87; Mr. Boecker, *id.* at 89; Prof. Gilmore, *id.* at 92. *But see* statement of Mr. Ireton, *id.* at 90-91.

110. Quite apart from the Code, itself, and all of the law review articles that were written before the Code, and such materials as the statements before the New York Law Revision Commission, note 109 *supra*, there is the evidence of his casebook on sales (1930). All the comments in that book indicate Prof. Llewellyn's feel for commerce, but perhaps the most striking feature of the book from this point of view is that it has an index to the cases based on the commodities that were the subject matter of the sale. This would be an inconceivable approach to one who was interested only in doctrine, and even nowadays, when nearly everyone in the commercial law area recognizes the necessity for the law to refer to the facts of commerce, this particular technique of differentiating legal problems according to their subject matter is not generally followed.

111. UNIFORM COMMERCIAL CODE § 2-711(1)(a).

ment of some organizations such as the Fresh Produce Marketers of the United States (an imaginary group, I trust), or a Chamber of Commerce, to be used to show what understanding should govern, absent specific indication to the contrary. This surely would be in line with the spirit (to say nothing of the letter¹¹²) of the Code and would permit it to be changed easily and variously to adapt to new conditions without the agony of drafting amendments and getting them adopted. There is not, after all, normally any pressing policy reason why businessmen should not be able to have the types of contracts they want. The problem is finding out what they do want.

It is even possible that the lawyer with a case might find this to be a useful approach. Using it, the entire case would be prepared to show what the understanding of the parties was, either because of particular negotiations, or because of the general understanding of persons in their position, without much reference to the Code (or for that matter to the Sales Act). Only after having worked it this way, would he check it out against the Code and resolve any differences. The possible advantage would be the general one which is supposed to accrue to him who makes the court want to decide in his favor on the facts, and how better to do this than by showing that this is what the parties agreed to do? Or, at any rate, that this is what they may reasonably be assumed to have had in mind. Similarly, if a lawyer is preparing forms, he will surely be more likely to be successful in his aim if he takes this approach (as many do, of course). If he drafts the document in such a way that the other party may be fairly said to have agreed to it, either because it is simple, not too one-sided, and all important provisions are in large type and obviously seen by him, or because it embodies the usual practice of the trade (the American Foreign Trade definitions, for example), or both. As a matter of fact, if he takes the other approach and regards the provisions of the Uniform Commercial Code as the limits of his universe, as the compartments into which all problems can and must be fitted, if he looks to the law instead of to the agreement (if he is litigating), or reasonableness and commercial good faith (if he is drafting), he is assuming that the rules of law are the determining factors in a court's decision—that law regulates experience and practice and has successfully created its own closed system to which men must adapt if they are so unfortunate as to come in contact with it. There are areas, to be sure, in which this is true, bankruptcy for example.¹¹³ But sales is not one of them. The Code,¹¹⁴ and for

112. See note 108 *supra*.

113. The possible citations are innumerable, but as good a one as any is the rule in *Moore v. Bay*, 284 U.S. 4 (1931). Under this rule, if A has a claim of \$2.43 against B which arises during a period between the execution and recording of a mortgage of \$100,000,000 from B to C which mortgage is under state law invalid as to A, then C's

that matter, the Sales Act,¹¹⁵ quite frankly permit themselves to be shunted aside by contrary agreement between the parties, and the parties, it seems safe to say, do not usually pay much attention to the law when they act. On the other hand, if forms are too one-sided, if they pay no attention to the other party's state of mind, they are unlikely to be very successful if they should happen to get into the courts.¹¹⁶

Perhaps one might say, to sum up, that in the field of sales between merchants the "law" of the formal legal system in the usual sense is almost irrelevant since the parties concerned rarely involve themselves with it. To say it another way, there are very few cases. Moreover, it is, after all, only money that is involved. Even if, by some odd chance, a merchant gets into court and loses a law suit because of a bad rule of law, or an uncommercial application of a good rule, it is not a personal tragedy, but simply a somewhat lower profit. Both parties will continue as before even if quite angry with each other—they may even do business together again. Under the current tax set-up, it is possible that a businessman may find a loss useful. Nor is there usually any public policy involved. The general policy is to let merchants do what they want to do. Hence this is a very low-pressure area of the law. One would suppose that the primary aim of the courts then should be to give results which will be reasonably satisfactory to parties who will have essentially the same over-all interests (buyer today will be seller tomorrow), to give commercially decent opinions. The courts have, for the most part, never really objected to this approach, and have in fact usually been sympathetic to it. Their chief problem has been that they did not know what was the decent thing to do, and they got little help. Their law was drafted in terms of real property conveyancing; the parties (merchants) were and are somewhat inarticulate; and lawyers frequently do not know much about commercial matters. With the Uniform Commercial Code we have been provided with a framework which encourages a recourse to commercial understanding for the law, and gives, in addition, a summary of what this understanding is today in most of the areas in which lawsuits can be expected. The opportunity is presented, in other words, to let the commercial law make commercial sense, but it can only be taken advantage of if the rules are regarded as being what they in fact are: a summary of com-

mortgage is invalid as to B's trustee in bankruptcy because liens invalid against creditors of the bankrupt are invalid against the trustee. See the discussion in MACLAGHLAN, *BANKRUPTCY* 330-35 (1956).

114. See note 108 *supra*.

115. *UNIFORM SALES ACT* § 71.

116. An excellent example is the disclaimer clause in the warranty of new automobiles disallowed in *Henningsen v. Bloomfield Motors, Inc.*, 32 N.J. 358, 161 A.2d 69 (1960).

mercial practice at the time of drafting as this was known to the drafters. They should obviously yield to special customs, and to changed conditions generally. In this way commercial law might come once again to be in fact, what it has never quite ceased to be called, the Law Merchant.